

**THOMAS L. KELLY**  
Claimant

**FIBERGLASS ENGINEERING, INC.,**  
**a.k.a. COBALT BOATS**  
Respondent

**ROYAL & SUNALLIANCE**  
Insurance Carrier

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## ORDER

Respondent appeals the February 7, 2000, Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded a 35 percent work disability based on a 29 percent task loss and a 41 percent wage loss. Respondent contends that claimant failed to prove that his ongoing injuries resulted from his employment with respondent, but instead stemmed from subsequent employment with Charloma Fiberglass. In the alternative, respondent argues that claimant's award should be limited to a functional impairment for his bilateral hand injuries.

Claimant appeared by his attorney, Randall J. Price of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas. There were no other appearances.

The record and stipulations set forth in the Award of the Administrative Law Judge were adopted by the Appeals Board for the purposes of this Order.

(1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent? In the alternative,

are claimant's ongoing symptoms related to his employment with Charloma Fiberglass?

- (2) What is the nature and extent of claimant's injury and/or disability as it relates to his employment with respondent?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant originally began working for respondent in 1983 and worked through July 1990 in their mold repair department. Claimant then quit respondent for several years. He returned in April of 1996 to the mold repair department, working with power tools, including buffers and sanders, and waxing. By June 24, 1997, claimant was experiencing numbness and pain through his hands and wrists and reported same to his employer. The record is contradictory regarding what symptoms claimant actually experienced at that time. At the time of preliminary hearing, claimant testified he had numbness in his hands and wrists and occasionally into his forearms. By the regular hearing a little over a year later, claimant's symptoms included pain and numbness in his hands, wrists, forearms, upper extremity, shoulders and neck. However, when claimant was referred to orthopedic surgeon Harry A. Morris, M.D., on September 8, 1997, claimant's complaints were primarily limited to his bilateral hands and wrists. Claimant suffered from constant numbness in both hands, with occasional radiation up his arm on the right side. Claimant underwent conservative care for a period of time and, on September 23, 1997, underwent surgery to release the carpal ligament on the right side. Claimant's condition improved after the surgery, with claimant experiencing only intermittent numbness after the surgery, rather than the constant numbness he experienced before. Claimant was returned to work with appropriate restrictions as of November 26, 1997.

By December 22, 1997, claimant was experiencing only minimal discomfort, with just a slight hint of numbness in the tips of his fingers on the right. Claimant still had intermittent numbness on the left, but not significant enough to allow for surgical intervention. Dr. Morris released claimant to work without restrictions at that time in an effort to test how claimant's extremities would respond to the work.

On February 2, 1998, claimant reported intermittent numbness in the left hand and some triggering of the left middle finger. He also had some numbness in the right hand, although less than he had experienced before the surgery. Dr. Morris recommended injecting the trigger finger on the left and continued claimant at work as before.

Dr. Morris last examined claimant March 16, 1998, at which time he released claimant to work without restrictions. He assessed claimant a 5 percent impairment to the body as a whole for the right upper extremity and a 3 percent impairment to the body as

a whole for the left upper extremity, which when combined equals an 8 percent whole person functional impairment. His medical report of March 16, 1998, also recommended claimant be placed on a dosepak for his trigger digits and, if claimant continued to have difficulties, in two to three weeks, he would reinject him in both the ring and middle fingers. He also opined that claimant may have to look for a less hand-intensive job if he wanted his symptoms to decrease.

Claimant continued working for respondent at his regular duties until May 9, 1998. At that time, he terminated his employment. Two days later, he began working for Charloma Fiberglass, buffing fiberglass objects. With Charloma Fiberglass, claimant was working fewer hours per day and handling smaller fiberglass objects. He was, however, handling the same type of power tools as with respondent.

At regular hearing, claimant was questioned regarding his reason for leaving respondent. He testified that he had been passed over for promotion on more than one occasion and was very upset with how respondent treated him. He was especially upset about the fact a female worker with less seniority than he was allowed a promotion into a supervisory position and he was not given the opportunity to interview for that position.

While working for Charloma Fiberglass, claimant's condition worsened. On July 2, 1998, he was examined at claimant's attorney's request by P. Brent Koprivica, M.D., board certified in emergency and occupational medicine. Dr. Koprivica found claimant to be suffering from bilateral carpal tunnel syndrome which he described as being worse than before. He also diagnosed bilateral ulnar neuropathy and cubital tunnel syndrome. Claimant continued working for Charloma Fiberglass until September 1998. At that time, claimant was provided with Dr. Koprivica's July 2, 1998, report, which recommended he avoid activities which required repetitive pinching or repetitive grasping, repetitive wrist flexion and extension, repetitive ulnar deviation of the wrist and repetitive elbow flexion and extension activities, and avoid exposure of both upper extremities to vibration. Dr. Koprivica also opined that, while claimant had left Cobalt Boats to go to a less stressful employment opportunity, ideally he would be better off reducing the amount of hand activities even further in terms of both repetitiveness and the exposure to vibration.

Claimant presented these restrictions to Charloma Fiberglass in September 1998 and, as a result, was terminated from his employment. Claimant testified that the work at Charloma Fiberglass was both repetitious and required he regularly use power tools. He acknowledged he was not able to continue working in that employment.

When asked if his condition worsened as a result of his employment with Charloma Fiberglass, claimant testified that it had.

After leaving Charloma Fiberglass, claimant was referred to board certified orthopedic surgeon J. Mark Melhorn, M.D., who specializes in hand and upper extremity surgeries.

Claimant was first examined by Dr. Melhorn on October 16, 1998. At that time, Dr. Melhorn diagnosed bilateral carpal tunnel syndrome with painful right and left upper extremity and shoulder symptoms, and also neck pain. Dr. Melhorn's report indicates that claimant last worked for respondent on September 2, 1998. This date would be more in line with claimant's last day of work with Charloma Fiberglass, rather than respondent.

Ultimately, Dr. Melhorn performed a left carpal tunnel syndrome release and a left ulnar nerve entrapment at the elbow on December 7, 1998. He then performed a repeat right carpal tunnel syndrome release and a right ulnar nerve entrapment release at the elbow and a decompression with a flexor tenosynovectomy on December 21, 1998. Claimant returned to Dr. Melhorn on January 4, 1999, with decreased symptoms and complaints. By February 15, 1999, claimant had negative percussion, negative Phalen's, negative direct, reverse and pronator tests, negative Finkelstein's and negative ulnar nerve tests at the wrists and the elbows. Claimant's medial and lateral epicondylar signs were also negative. Claimant did note that his right upper extremity bothered him a little more than the left, although, overall, claimant's symptoms were much improved.

Dr. Melhorn released claimant to return to work at a medium level of work, with recommended task and job rotation, and limited claimant's use of power and vibratory tools. He then assessed claimant a 9.45 percent whole body impairment for the right upper extremity and a 9.45 percent whole body impairment for the left upper extremity, which, when combined, equates to a 10.4 percent whole body functional impairment.

Claimant had earlier testified that, while working for Charloma Fiberglass, he was making the same amount of money as he earned while working for respondent. At the time of regular hearing, claimant was working for Zip Trip Corporation, earning \$6 per hour, working 40 hours per week, with no fringe benefits or overtime. This equates to an average weekly wage, post injury, of \$240 per week.

In proceedings under the Workers Compensation Act, it is claimant's burden to prove his or her entitlement to the benefits requested by a preponderance of the credible evidence. See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

In deciding whether claimant met with personal injury by accident with respondent, the Administrative Law Judge admitted to being befuddled as to why respondent denied the injury to claimant's bilateral upper extremities. It was apparent from the record claimant had, at very least, a right upper extremity injury when he underwent right carpal tunnel repair with Dr. Morris. In addition, Dr. Morris's medical records show several entries wherein claimant described bilateral upper extremity complaints involving at least his hands and wrists, while occasionally mentioning his right forearm and upper extremities. The Appeals Board agrees with the Administrative Law Judge that claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment while working for respondent, with those injuries being bilateral in nature.

With regard to the appropriate date of accident, the Appeals Board looks to the Supreme Court's recent decision of Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999). In Treaster, the Kansas Supreme Court went into a detailed discussion regarding dates of accident and microtrauma injuries in Kansas. While not citing Treaster, the Administrative Law Judge did find claimant's date of accident to be May 9, 1998, claimant's last day of work with respondent. In this instance, it would be possible to find an accident date before claimant's last day worked. However, claimant testified that his symptoms continued to worsen through his last day worked, even after undergoing the right carpal tunnel repair with Dr. Morris.

With regard to the nature and extent of claimant's injury and disability, the only functional impairment opinion presented contemporaneous with claimant's employment with respondent is that of Dr. Morris. Dr. Morris assessed claimant an 8 percent whole body functional impairment for the bilateral upper extremity symptoms, including the right carpal tunnel surgery. Dr. Melhorn assessed claimant a 10.4 percent whole body functional impairment for his bilateral upper extremity complaints. However, Dr. Melhorn's examination and treatment occurred after claimant worked for a period of several months with Charloma Fiberglass. While the work at Charloma Fiberglass was less intensive than that with respondent, claimant did, nevertheless, testify that his employment with Charloma Fiberglass aggravated his condition. In addition, after working at Charloma Fiberglass for a period of time, claimant was diagnosed not only with bilateral carpal tunnel syndrome, but also bilateral ulnar neuropathy and cubital tunnel syndrome by Dr. Koprivica and bilateral ulnar nerve elbow damage by Dr. Melhorn. Claimant then underwent bilateral carpal tunnel syndrome releases and bilateral ulnar nerve releases by Dr. Melhorn.

The Appeals Board finds, when considering the injuries suffered by claimant while working for respondent, claimant has an 8 percent whole person functional impairment as assessed by Dr. Morris.

After leaving his employment with respondent, claimant went to work for Charloma Fiberglass at a wage comparable to his wage with respondent. K.S.A. 1997 Supp. 44-510e states in part:

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Here, claimant left respondent's employment as a result of a dispute over promotions. Claimant did not testify to being unable to continue with respondent, but rather objected to his lack of promotion to a supervisory position. Claimant then went to work for another company, earning the same wage, doing similar, although somewhat lighter, work. While with the second company, claimant experienced an increase in

symptoms, resulting in more surgeries. The Appeals Board finds that claimant has shown a worsening of his condition with Charloma Fiberglass, which constitutes an intervening injury. Therefore, respondent's responsibility is limited to the 8 percent whole body functional impairment assessed by Dr. Morris.

Claimant, while working for Charloma Fiberglass, was earning 90 percent or more of his average weekly wage as of the date of accident. The Appeals Board finds, pursuant to K.S.A. 1997 Supp. 44-510e, claimant is not entitled to additional work disability from respondent.

Therefore, the Award of the Administrative Law Judge is modified to grant claimant an 8 percent whole person functional impairment.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated February 7, 2000, should be, and is hereby, modified, and an award is granted in favor of the claimant, Thomas L. Kelly, and against the respondent, Fiberglass Engineering, Inc., and its insurance carrier, Royal & Sunalliance, for an injury occurring through May 9, 1998, and based upon an average weekly wage of \$443.06, for an 8 percent whole person functional disability.

Claimant is entitled to 24.57 weeks temporary total disability compensation at the rate of \$295.39 per week totaling \$7,257.73, followed by 32.43 weeks permanent partial disability compensation at the rate of \$295.39 per week totaling \$9,579.50, for a total award of \$16,837.23. The entire award is due and owing and ordered paid in one lump sum minus any amounts previously paid as of this award.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the orders expressed herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER**CONCURRING AND DISSENTING OPINION**

The majority finds claimant did not leave his job with respondent due to his injury. He found other work almost immediately, doing essentially the same type of repetitive activities and using power tools. This work involves the same types of activities that caused his injuries while working for respondent and, therefore, constitutes an ongoing repetitive trauma accident. Under Treaster, the date of accident would be when claimant was terminated by the subsequent employer, Charloma Fiberglass, and stopped doing this offending activity. The claim for permanent disability benefits should have been filed against Charloma Fiberglass. Respondent, in its brief, accepts liability for an 8 percent impairment of function to claimant's bilateral upper extremities. This is what the majority's Order awards. For this reason, I concur with the permanent partial disability award, rather than dissent. I would not, however, award future medical treatment benefits against this respondent. I dissent from that portion of the award.

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BOARD MEMBER

c: Randall J. Price, Wichita, KS  
Kirby A. Vernon, Wichita, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director